

☐ EXPEDITE
☒ Hearing is Set:
Date: September 12, 2003
Time: 1:30 p.m.
Honorable Paula Casey

**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

PREMERA, a Washington non-
profit miscellaneous corporation;
and PREMERA BLUE CROSS, a
Washington non-profit corporation,

Petitioners,

v.

MIKE KREIDLER, Insurance
Commissioner for the State of
Washington,

Respondent.

NO. 03-2-00112-8

INSURANCE COMMISSIONER'S
MEMORANDUM REGARDING
DEFICIENCIES IN PREMERA'S
FORM A STATEMENT

Mike Kreidler, the Insurance Commissioner for the State of Washington (the "Commissioner") and head of the Office of the Insurance Commissioner ("OIC"), by and through his attorneys, Christine O. Gregoire, Attorney General, and Christina Gerstung Beusch, Assistant Attorney General, respectfully files this Memorandum regarding current deficiencies in Premera's Form A Statement that were identified prior to November 26, 2002.

1 In its Order, dated September 5, 2003, the Court remanded this matter with
2 instructions to issue a decision on Premera's request to convert to a for-profit
3 company (the "Proposed Transaction") within 60 days of September 5, 2003, unless
4 no later than September 10, 2003, the Commissioner identifies with specificity those
5 deficiencies in the Form A that were identified prior to November 26, 2002, that still
6 remain outstanding. On September 10, 2003, a Schedule of Deficiencies ("Schedule")
7 was sent to counsel for Premera. Exhibit 1 attached hereto.¹ Although the
8 Commissioner has objected to the narrow interpretation of what constitutes a
9 complete Form A articulated in the September 5 Order, the deficiencies in the
10 Schedule were determined with reference to this Court's rulings. In further
11 explanation of the deficiencies, Declarations of James Tompkins and Patrick Cantilo
12 are being filed herewith as Exhibits 2 and 3, respectively. Mr. Tompkins is the
13 Assistant Deputy Insurance Commissioner for Company Supervision and is a member
14 of the OIC Staff responsible for reviewing Premera's Form A. Mr. Cantilo is an
15 expert consultant to the OIC providing legal expertise with respect to reviewing the
16 Proposed Transaction and has extensive experience in non-profit conversions.

17 Premera's Form A is deficient in two respects.² Premera has not submitted the
18 Stock Ownership Plans it intends to adopt. Premera has not submitted schedules of
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20 ¹ Other documents that had been requested prior to November 26, 2002, but
21 were withheld by Premera were delivered on August 26, 2003, after an *in camera*
22 review was conducted to test Premera's claims of privilege.

23 ² The deficiencies identified herein relate to issues identified as of November 26,
24 2002. There could be other deficiencies as a result of issues identified after that date.
However, the Commissioner understands from the Court's rulings that such later
deficiencies are not considered by the Court as a basis to extend the time for the
Commissioner to issue his decision.

1 the assets and liabilities it intends to transfer to the newly formed Alaska Premera
2 Blue Cross health carrier. These documents specifically relate to Items in the Form A
3 filings that Premera made in September and October, 2002, and are required as part of
4 the Form A Statement pursuant to RCW 48.31C.030(2), RCW 48.31B.015(2), WAC
5 284-18A-910, and WAC 284-18-910. The Schedule of Deficiencies specifically
6 identifies the sections of the statutes and regulations relevant to the deficiencies and
7 the Item numbers in Premera's Form A where the deficiencies are found.³

8 **1. Stock Ownership Plans**

9 Premera is required to file as an exhibit to its Form A Statement copies of all
10 agreements, contracts, or arrangements relating to the transfer and acquisition of stock
11 *See, e.g.,* RCW 48.31C.020(e) and (g); WAC 284-18A-910 Items 7(c) and 8(c).
12 Premera has submitted a general statement that it will adopt one or more stock-based
13 compensation plans subject to certain limitations and restrictions outlined in Exhibit
14 G-10 to the Form A Statement. However, Premera has not submitted with its Form A
15 the Stock Ownership Plans, including specific terms and provisions, it intends to
16 adopt. In his Declaration, Mr. Cantilo, who has had extensive experience assisting
17 state insurance commissioners in reviewing conversion transactions, explains the
18 importance of having the Stock Ownership Plans, as follows:

19 Although Premera has described generally the restrictions and
20 limitations by which it intends to abide, these plans are often very
21 complicated and require detailed review. It is important to understand

22 ³ A third deficiency regarding the November 2001 Accenture Report was
23 included in the Schedule. A copy of the survey was delivered to undersigned counsel
24 yesterday. OIC Staff had not received it previously; however, it has been confirmed
that Premera previously directed the consultants to a website where the report could be
found. There is no deficiency with respect to the survey.

1 what incentives are created by these plans. Agreements governing the
2 dates and conditions upon which stock options may be awarded and
3 exercised may well provide substantial incentives for management to
4 conduct the companies' affairs in a manner inconsistent with the best
5 interests of policyholders and the public. Without the plans, the
6 consultants will be unable to make a complete determination that
7 satisfies the contemplated scope of review under the Holding Company
8 Acts. [Cantilo Dec. at para. 11]

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10 Premera circumvents the Form A requirements by arguing that it cannot
11 produce the plans because its board has not yet adopted them. The company further
12 asserts that it has not "entered into" any "contracts, arrangements, or understandings,"
13 therefore, the statutory and regulatory requirements to submit its plans are not
14 triggered. This argument distorts the purpose of the Form A, which is to disclose
15 fully the terms, conditions, and circumstances of the transaction that the insurer is
16 proposing should be approved. Indeed, the Form A is the vehicle for reducing the
17 insurer's general intentions about future events to specifics. Moreover, Exhibit G-10
18 and the October 18, 2002, Minutes of the Board reveal that the officers and directors
19 of Premera have discussed a stock program and intend to adopt one. See Exhibits to
20 the Declaration of Barlow filed by Premera. There is certainly an understanding that
21 Stock Ownership Plans will be implemented as part of the compensation package
22 post-conversion. Other Blue Cross Plans that have converted have done so. Cantilo
23 Dec. at para.7. Premera should not be permitted to use its avoidance of developing
24 the specific terms of its stock compensation plans as a means to argue that it has

1 satisfied the requirements of filing a complete Form A. *See* Cantilo Dec. at para. 8
2 and 9.

3 Premera has consistently maintained its position with the OIC Staff and the
4 consultants that it does not and will not provide any detailed information over and
5 above what is described in Exhibit G-10. Because further requests by the Staff and its
6 experts appeared futile, the request was closed and marked complete in that additional
7 detail would not be forthcoming from Premera. Declaration of James Tompkins at
8 para. 7. However, the fact that Premera has submitted all the response it intends to
9 submit to the Staff does not mean that the Form A is complete or that the
10 Commissioner must declare it complete. The Commissioner was directed in this
11 Court's remand instructions to identify any outstanding Form A deficiencies. At the
12 November 26, 2002, hearing before the Commissioner a staff representative identified
13 that information regarding executive compensation was still outstanding. The Staff
14 informed the Commissioner that the consultants had not yet received "detailed
15 employment contracts and severance agreements" and "additional detail regarding
16 Premera's current and proposed executive compensation." R. at 226. The stock
17 programs are part of a proposed compensation package. The absence of this
18 information was a basis for the Commissioner finding in his Third Order that the
19 Form A was not complete as of November 26, 2002. R. at 273-74. The Form A is
20 still not complete for the same reason.
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1 **2. Schedule of Assets and Liabilities to be Transferred to Premera of Alaska**

2 These schedules pertain to the assets and liabilities that Premera intends to
3 transfer with its current Alaska operations to its proposed Alaska for-profit subsidiary.
4 Premera’s submittal regarding these schedules is at Exhibit G-11 to its Form A
5 Statement. Completed Schedules are required under RCW 48.31C.030(2)(d) and
6 (2)(g), and WAC 284-18A-910, Items 5 and 8, as part of the Form A Statement. *See*
7 *also* 48.31B.015(2)(d) and (2)(g); 284-18-910, Items 5 and 8.

9 Premera has thus far provided only the most cursory information. For
10 example, Premera reveals only that it intends to transfer in assets “cash and
11 investment securities (that will be identified) determined necessary to comply with the
12 applicable minimum capital, surplus, and risk based capital requirements imposed by
13 the State of Alaska’s Insurance Code.” Exhibit I, page 8 to the Declaration of James
14 Tompkins. Assistant Deputy Commissioner Tompkins articulates the important need
15 for complete information regarding the transfer of assets and liabilities as follows:
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17 One of the important aspects to be considered in a change in control of a
18 health carrier and/or insurance company is the amount, if any, of any
19 assets and liabilities that will be withdrawn from the company as a
20 result of the transaction. It is very important and required by RCW
21 48.31B.015 and 48.31C.030 that the Insurance Commissioner determine
22 that the company will be financially viable upon conclusion of the
23 transaction. Therefore, if the Insurance Commissioner does not receive
24 the information regarding the amount and nature of the assets and
liabilities that will be withdrawn from the company as a result of the
transaction, he is unable to make this determination. [Tompkins Dec. at
para. 8]

1 Indeed, Premera acknowledges in its letter dated January 17, 2003, that the
2 Commissioner can condition approval of the entire transaction on the production of
3 these schedules by Premera and review and approval of them by the Commissioner.
4 Exhibit F, page 3 to Declaration of James Tompkins. Premera claims that the
5 information is not reasonably available to it. However, the claim is not well-founded.
6 Surely Premera knows its assets and liabilities and what it expects to attribute to the
7 Alaska operations, even if there may need to be amendments to the schedules prior to
8 the consummation of the transaction. If it is impractical to provide final schedules,
9 Premera may file a request in a separate document for an extension of time to file
10 final schedules to a specified date. WAC 284-18A-320(2). An extension of time,
11 however, is not the right to omit the schedules from the Form A or a waiver of a
12 deficiency.
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15 Until this Court's Order on September 5, 2003, the OIC Review Staff and its
16 experts have been operating under the orders of the Commissioner that stated that the
17 Form A will not be considered complete until the administrative proceeding is closed.
18 As with the Stock Ownership Plans, once Premera took the position that it did not
19 intend to further supplement its Form A with asset and liability schedules, the request
20 was closed. However, the fact that the Premera has completed the response it intends
21 to give does not mean that the Form A is complete or that the Commissioner must
22 declare it so. The Commissioner was directed in this Court's remand instructions to
23 identify any outstanding Form A deficiencies related to issues raised as of November
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1 26, 2003. The cursory information provided regarding the transfer of assets and
2 liabilities constitutes such a deficiency; therefore, the Form A is not complete.

3 The Commissioner has followed this Court's September 5 Order in identifying
4 with specificity deficiencies in the Form A. The exhibits regarding the Stock
5 Ownership Plans and the Schedules of Assets and Liabilities are clearly required to be
6 filed as part of the Form A; indeed, Premera acted under that assumption when it
7 made its filings. The determination that the exhibits submitted by Premera are
8 deficient is within the special expertise of the Commissioner and the OIC Staff.
9 Respectfully, the Court should not overrule these determinations and substitute its
10 judgment for the Commissioner's. Consistent with this Court's Order of September 5,
11 2003, the 60-day timeframe within which the Commissioner must decide on the
12 Proposed Transaction should not begin to run until these deficiencies are cured.
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15 DATED this 12th day of September, 2003.

16 CHRISTINE O. GREGOIRE
17 Attorney General

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